Government of Malaysia v Sarawak Properties Sdn Bhd

HIGH COURT (KUCHING) — SUIT NO KG61 OF 1992(I)
CHONG SIEW FAI J
4 OCTOBER 1993

Revenue Law *— Income tax — Appeal — Whether court has jurisdiction to hear appeal against incorrect assessment*

Revenue Law *— Income tax — Recovery of unpaid taxes — Whether government was estopped by letter from Inland Revenue Department stating no taxes were payable by the defendant*

Revenue Law *— Income tax — Method of assessment — Whether plaintiff could adopt different method for different years of assessment in relation to the same subject matter*

Revenue Law *— Income tax — Assessment — Whether government bound by representations and conduct of Inland Revenue officers*

Revenue Law *— Income tax — Res judicata — Whether applicable to decisions of tax commissioners*

For the years of assessment 1986 and 1989, the defendant was assessed on income tax and development tax in the sums of RM5,461,730.88 and RM2,022,130, respectively. Notices of assessment dated 25 October 1988 and 30 January 1991, respectively, for the said two sums were issued. Despite the denial in the defence, there is uncontroverted evidence that the said two notices of assessment were duly served on the defendant. Owing to the repeated failures of the defendant to pay the taxes in full within the permitted periods, a 10% increase of the unpaid tax and subsequently another 5% of the total balance unpaid were imposed in each case in accordance with ss 103(4) and 103(5A) of the Income Tax Act 1967 ('the Act'), respectively. With the two increases, the total amount under the two notices of assessment was RM7,035,353.60, and as the amount was not paid, the plaintiff commenced this action claiming for the sum.

The defendant filed a defence and counterclaim. The counterclaim was later abandoned. By a summons-in-chambers dated 5 November 1992, the plaintiff applied for summary judgment in the sum claimed, ie RM7,035,353.60 with interest at 8%pa and costs. In the application, the plaintiff also sought to strike out the defence and counterclaim. The deputy registrar, after hearing the application, allowed summary judgment to be entered, holding that the defendant had not raised any triable issue. The defendant has appealed.

Held, dismissing the appeal:

(1) In an action for recovery of tax due and payable, the court is precluded from entertaining any plea that the amount of tax

sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under s 103(4), (5) or (5A). In respect of the assessment of the tax in this case, there had been an appeal to the special commissioners. However, neither party in this action had revealed the basis or reasoning for the assessment in respect of which the appeal to the special commissioners was lodged. Therefore, it was not unreasonable to assume that by alleging estoppel, the defendant was saying that the tax sought to be recovered was incorrectly assessed and that the defendant was not liable to tax or owing no tax at all. The defendant cannot plead this before the court in an action for recovery of tax under s 106(1). The point should be raised in the appeal before the special commissioners.

(2) Moreover, there is no estoppel as against the Crown on revenue matters as an estoppel against the Crown cannot be created by a taxing officer entering into an agreement purporting to conclude tax and related questions for future years, or conclude any expression of opinion or adopting any course of action.

(3) The question of the applicability of estoppel against the Crown does not necessarily depend on the existence of any mistake on the part of revenue officers but rests on the broader basis as to whether the Crown is bound by representations and conduct of the officers of the Inland Revenue irrespective of the presence or otherwise of any mistake.

(4) The fact that the Inland Revenue Department had accepted or adopted a certain method of assessing tax does not preclude it from departing from the existing method or practice and changing its opinion by adopting a different form of assessing tax.

(5) The doctrine of res judicata does not apply to the decisions of income tax commissioners.

[Bahasa Malaysia summary

Untuk tahun taksiran 1986 dan 1989, defendan telah ditaksirkan cukai pendapatan dan cukai pembangunan sebanyak RM5,461,730.88 dan RM2,022,130, masing-masing. Notis taksiran bertarikh 25 Oktober 1988 dan 30 Januari 1991, masing-masing, untuk dua jumlah tersebut telah dikeluarkan. Walaupun dinafikan di dalam pembelaan, terdapat keterangan yang tidak dipertikaikan bahawa dua notis tersebut telah disampaikan atas defendan. Disebabkan kegagalan berulang defendan untuk membayar cukai itu dengan penuh di dalam tempoh yang dibenarkan, suatu peningkatan 10% ke atas cukai yang belum dibayar dan seterusnya 5% lagi ke atas jumlah baki yang belum dibayar dikenakan pada setiap kes mengikut ss 103(4) dan 103(5A) Akta Cukai Pendapatan 1967 ('Akta itu'), masing-masing. Dengan dua peningkatan itu, jumlah di bawah dua notis penaksiran itu menjadi RM7,035,353.60 dan, oleh kerana jumlah itu tidak dibayar, plaintif memulakan tindakan ini untuk menuntut jumlah itu.

Defendan telah memfailkan suatu pembelaan dan tuntutan balas. Tuntutan balas itu kemudiannya dihentikan. Melalui suatu saman dalam kamar bertarikh 5 November 1992, plaintif telah memohon penghakiman terus untuk jumlah yang dituntut, iaitu RM7,035,353.60 dengan faedah pada 8% setahun dan kos. Dalam permohonannya, plaintif juga memohon untuk membatalkan pembelaan dan tuntutan balas. Timbalan pendaftar, setelah mendengar permohonan itu, membenarkan penghakiman terus dimasukkan, dengan memutuskan bahawa defendan tidak menimbulkan sebarang isu yang perlu dibicarakan. Defendan telah membuat rayuan.

Diputuskan, menolak rayuan itu:

(1) Dalam sesuatu tindakan untuk mendapat kembali cukai yang kena dibayar, mahkamah tidak boleh mendengar sebarang pli bahawa jumlah cukai yang ingin didapatkan kembali itu adalah berlebih-lebihan, salah taksir, di bawah rayuan atau ditambahkan secara salah di bawah s 103(4), (5) atau (5A). Dari segi pentaksiran cukai di dalam kes ini, suatu rayuan telah dibuat kepada pesuruhjaya khas. Walau bagaimanapun, kedua-dua pihak kepada tindakan ini yang tidak mendedahkan alasan atau sebab untuk taksiran berkenaan dengan mana rayuan itu telah dibuat kepada pesuruhjaya khas. Oleh itu, adalah munasabah untuk menganggap bahawa dengan mengatakan estopel, defendan sedang menyatakan bahawa cukai yang ingin didapatkan kembali itu telah ditaksirkan dengan salah dan defendan tidak bertanggungan untuk membayar cukai ataupun tidak ada cukai yang dihutang. Defendan tidak boleh mengatakan demikian di mahkamah dalam suatu tindakan untuk mendapat kembali cukai di bawah s 106(1). Perkara ini harus ditimbulkan dalam rayuan di hadapan pesuruhjaya khas.

(2) Lebih-lebih lagi, tidak terdapat estopel terhadap kerajaan berkenaan atas perkara hasil kerana suatu estopel terhadap kerajaan tidak boleh diwujudkan oleh seorang pegawai cukai melalui suatu pengikatan perjanjian yang bertujuan menyelesaikan soalan cukai dan perkara yang berkaitan dengannya untuk tahun yang akan datang, atau untuk menyelesaikan sebarang pendapat atau mengambil sebarang tindakan.

(3) Soalan mengenai pemakaian estopel terhadap kerajaan tidak semestinya bergantung kepada wujudnya sebarang kesilapan oleh pegawai hasil tetapi bergantung kepada asas yang lebih luas, iaitu sama ada kerajaan diikat oleh pernyataan dan kelakuan pegawai Jabatan Hasil Dalam Negeri tidak kira sama ada terdapat kesilapan atau sebaliknya.

(4) Hakikat bahawa Jabatan Hasil Dalam Negeri telah menerima atau menggunakan sesuatu cara pentaksiran cukai tidak menghalangnya daripada menyimpang dari cara atau amalan yang wujud sekarang dan menukar pendapatnya dengan menggunakan cara yang berlainan untuk mentaksirkan cukai.

(5) Doktrin res judicata tidak terpakai kepada keputusan pesuruhjaya cukai.]

[*Editorial Note*: The defendant has appealed to the Supreme Court vide Civil Appeal No 01-60-93.]

Notes

For cases on appeals against income tax assessments, see 10 *Mallal's Digest* (4th Ed) paras 1490–1506.

Cases referred to

1 *Sun Man Tobacco Co Ltd v Government of Malaysia* [1973] 2 MLJ 163 (folld)
2 *Inland Revenue Commissioners v Pearlberg* [1953] 1 All ER 388; [1953] 1 WLR 331 (folld)
3 *Trustees of the Will of HR Brodie (decd) v Inland Revenue Commissioners* (1933) 17 TC 432 (folld)
4 *Gresham Life Assurance Society v A-G* (1916) 7 TC 36 (refd)
5 *R v Inland Revenue Commissioners, ex p Preston* [1985] AC 835; [1985] 2 All ER 327; [1985] 2 WLR 836 (refd)
6 *Liberty & Co Ltd v The Commissioners of Inland Revenue* (1924) 12 TC 630 (folld)
7 *Government of Malaysia v DC* [1973] 1 MLJ 161 (folld)
8 *Pethaperumal Chettiar v Commissioner of Income Tax* [1943] 1 TR 532 (refd)
9 *Patuck v Lloyd (Inspector of Taxes)* (1944) 26 TC 284 (refd)
10 *Arumugam Pillai v Government of Malaysia* [1975] 2 MLJ 29 (refd)

Legislation referred to

Income Tax Act 1967 s 142(1), (2)

Kilat Beriak (*Chew, Jugah, Wan Ullok, Goh & Co*) for the defendant.
Abdul Karim bin Abdul Jalil (Senior Federal Counsel) for the plaintiff.

Cur Adv Vult

Chong Siew Fai J: This is an appeal by the defendant, a limited company, against the decision of the learned deputy registrar granting summary judgment for the plaintiff, the Government of Malaysia, in the sum of RM7,035,353.60, interest and costs.

The undisputed facts are short and simple. For the years of assessment 1986 and 1989, the defendant was assessed on income tax and development tax in the sums of RM5,461,730.88 and RM2,022,130, respectively. Notices of assessment dated 25 October 1988 and 30 January 1991, respectively for the said two sums were issued. Despite the denial in the defence, there is uncontroverted evidence, which I accept as the truth, that the said two notices of assessment were duly served on the defendant. Owing to the repeated failures of the defendant to pay the taxes in full within the permitted periods, a 10% increase of the unpaid tax and subsequently another 5% of the total balance unpaid (ie 5% of the aggregate sum of the unpaid tax and the 10% increase) were imposed in each case in accordance

with ss 103(4) and 103(5A) of the Income Tax Act 1967 ('the Act') respectively. With the two increases, the total amount under the two notices of assessment is RM7,035,353.60, particulars whereof are as follows:

(i) Year of assessment 1986: amount of tax RM5,461,730.88

Less payment	Balance	10% increase	5% increase	Total
1,381,730.88	4,080,000	408,000	224,400	4,712,400

(ii) Year of assessment 1989: amount of tax RM2,022,130

Less payment	Balance	10% increase	5% increase	Total
10,914.75	2,011,215.25	201,121.52	110,616.83	2,322,953.60
				7,035,353.60

As the amount of RM7,035,353.60 was not paid, the plaintiff commenced this action claiming for the sum.

The defendant filed a defence and counterclaim. The counterclaim was for:

(a) a declaration that the plaintiffs' basis and/or principle of accounting is improper, wrong and erroneous in fact and in law in respect of the said development project; and

(b) a declaration that the defendants' basis and/or principle of accounting is correct and proper in fact and in law with regard to the said development project.

By a summons-in-chambers dated 5 November 1992, the plaintiff applies for summary judgment in the sum claimed, ie RM7,035,353.60 with interest at 8%pa and costs.

In the application, the plaintiff also seeks to strike out the defence and counterclaim. The notes of proceedings before the deputy registrar were not made available to me. However, it was indicated that the counterclaim had been abandoned. This was only right. In proceedings by the Government for the recovery of any taxes, duties or penalties, a person is not entitled to avail himself or itself of any set-off or counterclaim. (See O 73 r 4(1) of the Rules of the High Court 1980 implementing s 42(2)(e)(i) of the Government Proceedings Act 1956).

The plaintiff's application is supported by one Richard Foo Chi Ing's affidavit affirmed on 4 November 1992, while the defendant filed an affidavit in opposition made by one Chan Seng Chai.

The learned deputy registrar, after hearing the application, allowed summary judgment to be entered holding that the defendant had not raised any triable issue.

To begin with, it was raised on behalf of the defendant as a preliminary objection that the affidavit of Richard Foo Chi Ing affirmed on 4 November 1992 was improper in that it contained headings entitled 'Reply and defence to counterclaim', 'Reply' and 'Defence to counterclaim'. I agree that the headings should not have been inserted. However, they are mere irregularities

A in form and do not affect the substance or contents of the application. It was not shown how the defendant had been prejudiced by them. The affidavit otherwise satisfies the essential requirements for the purpose of application for summary judgment under O 14. I fail to see how the application is in any way so affected by the irregularities that it should be struck out or why the affidavit should not be used.

B On the substantive grounds of objection, firstly, it was contended for the defendant that the plaintiff was estopped from claiming the sum of RM5,461,730.88 in respect of the year of assessment 1986 because of the letter dated 20 June 1987 (exh CSC2 annexed to Chan Seng Chai's affidavit). That letter was signed by an officer, one Saibun Salam of the C Inland Revenue Department and addressed to Messrs Ho & Co, the auditor of the defendant company. It reads:

> Sarawak Properties Sdn Bhd
>
> Berasaskan kepada maklumat yang dikemukakan dalam Borang C retan cukai pendapatan, pengiraan cukai dan akaun beraudit pelanggan tuan, pelanggan D tuan tidak dikenakan cukai bagi tahun taksiran 1986.
> 2 Kerugian yang dilaraskan dan elaun modal yang boleh dihantar ke hadapan ialah RM1,060,146 dan $ tiada masing-masing.

I would here divert slightly to point out that estoppel by reason of the letter exh CSC2 has not been specifically pleaded in the defendant's defence as E it should have been.

Now, on the substantive contention. In an action for recovery of tax due and payable, the court is precluded from entertaining any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under s 103(4), (5) or (5A). (See F s 106(3) of the Act). It is not in dispute that respecting the assessment of the tax in this case, there has been an appeal to the special commissioners. However, neither party in this action has revealed what was the basis or reasoning for the assessment respecting which the appeal to the special commissioners was lodged. There is virtually no material before me as to why and/or on what basis an assessment of the tax was made subsequent to G the letter CSC2. In the circumstance, it is in my view not unreasonable to assume that by alleging estoppel, the defendant is saying to the effect that the tax sought to be recovered is incorrectly assessed in that the defendant is not liable to tax or owing no tax at all. This I do not think the defendant can plead before the court in an action for recovery of tax under s 106(1). H The point should, if considered necessary, be raised in the appeal before the special commissioners. As observed in *Sun Man Tobacco Co Ltd v Government of Malaysia*[1] (per Gill FJ at p 165):

> It is open to a taxpayer to go before them [meaning special commissioners of Income Tax] and prove that he is not liable to assessment. The doors of justice I are not shut to him merely because the claimant is the Government, but he has to enter the doors of the special commissioners first to raise the plea ... It is only after he has availed himself of that remedy as laid down by the law that he has a right to come to the courts.

From the decision of the special commissioners either party may appeal on a question of law by requiring the special commissioners to state a case to the High Court (Sch 5 para 34 of the Act).

In *Inland Revenue Commissioners v Pearlberg*,[2] Mr Pearlberg was served with notices stating that it was intended to proceed against him for the recovery of tax on certain properties, as having been the landlord thereof though not named in the assessments. In respect of other properties, he was assessed to the tax as landlord. On an application for summary judgment in an action for the recovery of the tax, Mr Pearlberg sought leave to defend on the ground that he was not in fact the landlord. It was held that issues on the merits should have been determined by appeal to the commissioners and could not be raised in the proceedings for recovery.

Assuming I am wrong on the above view, it is my opinion that the plaintiff cannot be estopped by means of exh CSC2. The principle that there is no estoppel as against the Crown on revenue matters is well established.

An estoppel against the Crown cannot be created by a taxing officer entering into an agreement purporting to conclude tax and related questions for future years, or conclude any expression of opinion or adopt any course of action. In *Trustees of the Will of HR Brodie (decd) v Inland Revenue Commissioners*,[3] an expression of opinion that certain profits were not assessable was held not to create estoppel. Finlay J said (at p 441):

> ... but, in the second place ... I do not think that it is any part of the duty of officials of the Inland Revenue to make contracts or to make declarations and I think it is impossible to hold that the Crown is, under these circumstances, bound by statements made by those officials, and that applies to statements made by the special commissioners or statement made by an inspector of taxes.

In *Gresham Life Assurance Society v A-G*,[4] an action for a declaration that the Crown was bound to adopt a certain basis of assessment following correspondence with the surveyor of taxes, it was held that any agreement to abide by a particular basis, if made, would be ultra vires the surveyor and the commissioners of Inland Revenue.

It cannot be doubted that the Director of Inland Revenue and his subordinate officers down to those charged with the due administration of the Act are holding public offices (s 134 of the Act) and, in carrying out their tasks of assessing taxes under the Act, are performing public duties. As such, the doctrine of estoppel by record does not apply to them in that they cannot, by issuing a letter such as exh CSC2, be estopped from subsequently exercising a power or discretion which it is their duty to exercise, though, as decided in *R v Inland Revenue Commissioners, ex p Preston*,[5] they are amenable to judicial review if they exceed or abuse their powers.

Learned counsel for the defendant sought to distinguish *Brodie's Trustees'* case,[3] and some other cases cited for the plaintiff by alluding to the element of mistakes. We are dealing with legislative provisions relating to tax and revenue matters. In my opinion, the question of the applicability of estoppel against the Crown does not necessarily depend on the existence of any mistake on the part of revenue officers but rests on the broader basis as to whether the Crown is bound by representations and conduct of the officers

of the Inland Revenue irrespective of the presence or otherwise of any mistake.

In *Liberty & Co Ltd v The Commissioners of Inland Revenue*,[6] Rowlatt J observed (at p 639):

> ... it must be pointed out that the commissioners of Inland Revenue have no power to bind the Crown by a general declaration of what the law is in particular circumstances beforehand. They make a statement for the information of those who like to act upon it in perfect faith and having great skill, and the parties to whom it is addressed may say, 'The commissioners say this, it is probably right', and they are justified in acting upon it from that point of view in the same sense as they are justified in acting on the view of any person who advises them with knowledge to the best of his ability. But the commissioners cannot bind the Crown.

I find the contention of the appellant unsustainable.

Next, for the appellant the question was posed as to whether the certificate dated 4 November 1992 (exh RF7 annexed to Richard Foo Chi Ing's affidavit affirmed on 4 November 1992) was open to challenge. It was contended that the certificate was inconclusive. Reference was made to s 142(2) of the Act where the words 'until the contrary is proved' were used. And it was further submitted that because of exh CSC2, the defendant had not discharged the burden of proof.

Exhibit RF7 is a certificate under the hand of the Director of Inland Revenue, Sarawak, pursuant to s 142(1) of the Act. It certifies that the defendant had defaulted in the payment of RM7,035,353.60 (the amount claimed in the action under appeal), being the aggregate of taxes due and payable for the years of assessment 1986 and 1989 and the increases imposed for non-payment under s 103(4).

Section 106(1) of the Act enacts that the tax due and payable may be recovered by the Government by civil proceedings as a debt due to the Government. Section 142(1) of the Act provides:

> In a suit under section 106 the production of a certificate signed by the Director General giving the name and address of the defendant and the amount of tax due from him shall be sufficient evidence of the amount so due and sufficient authority for the court to give judgment for the amount.

Thus it is an evidential provision stating the effect of a certificate issued thereunder and enabling the court to rely thereon to give judgment for the amount claimed.

In *Government of Malaysia v DC*,[7] Chang Min Tat J said (at p 164):

> ... once an assessment is made, Revenue can invoke ss 103 and 106 of the 1967 Act, the effect of such sections being that the tax payable under the assessment shall on the service of the notice of assessment on the person assessed be due and payable at the place specified in the notice, whether or not that person appeals against the assessment and such tax due and payable may be recovered by the Government by civil proceedings as a debt due to Government. Under s 106(3), the court is debarred from entertaining any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under s 103(4) or (5). By s 106, the certificate of the Comptroller-General, including his deputy or assistant, is sufficient evidence of the amount of tax due

and sufficient authority for the court to give judgment for that amount and for execution to be levied. A

If that is the law and if it is the duty of the courts established in the land to carry out and give effect to the law enacted by Parliament, then that is the end of the matter.

So far as is relevant, s 142(2) of the Act provides: B

In ... civil proceedings under this Act any statement purporting to be signed by the Director General or an authorized officer which forms part of or is annexed to the ... statement of claim, shall, until the contrary is proved, be evidence of any fact stated therein: ...

The question is: does exh CSC2 dated 20 June 1987 prove to the contrary C of any of the matters stated in exh RF7? This calls for a closer examination of the two documents.

As stated earlier, exh RF7 dated 4 November 1992 is a certificate under the hand of the Director of Inland Revenue to the effect that the defendant had made default in the payment of RM7,035,353.60 being taxes and D increases (as particularized therein) imposed due and payable for the years of assessment 1986 and 1989. I have also referred to exh CSC2 dated 20 June 1987. It spoke of non-chargeability to tax for the year of assessment 1986 according to Income Tax Form C submitted, and the carrying forward of the adjusted loss. It made no specific mention at all of any of the matters raised in exh RF7, eg the amount and the increases of the taxes due and E payable therein stated and the default in the payment thereof. In the circumstance, the defendant, in my view, has not discharged the burden of proving to the contrary evidence of the above-mentioned facts stated in exh RF7. Exhibit CSC–2, in my opinion, is no answer to the matters which are contained in exh RF7 and which took place subsequent to exh CSC2. F

Under s 106(3) of the Act, the court is not to entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under s 103(4), (5) or (5A). As to the effect of s 106(3), I would again refer to *Sun Man Tobacco Co Ltd v Government of Malaysia*[1] where Azmi LP said (at p 164): G

In my opinion the learned judge was right in this instant case where he said that if the taxpayer wished to dispute that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under s 103(4) or (5) he has to do so by appeal to the special commissioners. That opinion would appear consistent with the scheme of the Income Tax legislation. It is only in relation to any dispute on questions of law at the hearing before the H special commissioners that the matter can be brought to the High Court by way of a case stated.

See also the judgment of Gill FJ in that case.

Having regard to the contents of exh CSC2, the submission for the defendant, and bearing in mind the provision of s 106(3), exh CSC2 in my I view is insufficient to discharge the burden of displacing the statutory effect of the certificate exh RF7.

The second contention of the defendant has no merit.

A Lastly, it was contended for the defendant that since the plaintiff had, for the years of assessment 1981–1985 (both inclusive), agreed to and accepted what was called 'the completed contract' method of accounting adopted by the defendant respecting the same project and had assessed taxes on that basis, the plaintiff was estopped from changing to a new method (known as the 'percentage completion method') to assess the tax respecting the year of B assessment 1986 in relation to the same project.

With respect I am unable to agree to the contention. The fact that the Inland Revenue Department had accepted or adopted a certain method of assessing tax does not preclude it from departing from the existing method or practice and changing its opinion by adopting a different form of assessing C (*Pethaperumal Chettiar v Commissioner of Income Tax*[8]).

The doctrine of res judicata does not apply to the decisions of income tax commissioners (*Patuck v Llyod (Inspector of Taxes)*[9]).

In any event, the contention is tantamount to disputing the correctness of the assessment. This is not justiciable under s 106(3) of the Act in an action for recovery of tax brought under sub-s (1) thereof (*Sun Mun* D *Tobacco Co Ltd v Government of Malaysia*[1]). See also *Arumugam Pillai v Government of Malaysia.*[10]

The last ground also fails.

The appeal therefore is dismissed with costs to the plaintiff. The decision of the learned deputy registrar granting summary judgment to the plaintiff E is to stand.

At the hearing of the appeal, counsel for the appellant/defendant urged that in the event of the appeal being dismissed, stay of execution of the judgment be granted. As I had indicated, I am not prepared to consider the matter at this stage. The appellant/defendant may apply giving reasons, if it so wishes.

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Appeal dismissed.

Reported by Jeanne Tan

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